IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-800

CHARLES E. ALLEN
and
JOHN W. HORN, et al.
Petitioners,

vs.

COLUMBUS COATED FABRICS,
A DIVISION OF BORDEN CHEMICAL CO.,
EASTMAN KODAK COMPANY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION FOR RESPONDENTS, BORDEN, INC., EDWARD L. MAHONEY AND DEWEY BENNETT

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OPINIONS BELOW

The Supreme Court of Ohio, in denying motions to certify and *sua sponte* dismissing the appeals for the reason that "no substantial constitutional questions exists herein," rendered no opinion. The decision of

the Court of Appeals for Franklin County in the Charles E. Allen, et al. case is set forth at pp. 16-28 of the Petition. The decision of the trial court in the case is set forth herein as Appendix A-1, *infra*, p. 15. The judgment entry of the trial court sustaining motions of respondents for summary judgment in their favor is set forth herein as Appendix A-2, *infra*, p. 17. None of the decisions herein have been reported.

JURISDICTION

This Court, admittedly, has jurisdiction by virtue of the provisions of 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the "exclusive remedy" provisions of the Ohio Constitution and Ohio Statutes, which preclude recovery of damages at common law by an employee from his own employer who is complying with the provisions of the Ohio Workmen's Compensation Act, or the recovery of damages from other employees of such employer, for injuries sustained by the employee in the course of and arising out of his employment, are unconstitutional as depriving such employees "of life, liberty or property, without due process of law" in violation of the Fifth Amendment and the Fourteenth Amendment, or as denying such employees "the equal protection of the laws" in violation of the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provision of the Ohio Constitution, claimed by petitioners to be unconstitutional, is Article II, Section 35. Its full text, as amended in 1924, and now in full

force and effect, appears at pp. 36 and 37 of the Petition.

The Ohio Statutes, claimed to be unconstitutional, are Sec. 4123.74 and 4123.741 of the Ohio Revised Code. Their full text is set forth at p. 43 of the Petition.

STATEMENT OF THE CASE

Each of the petitioners herein are, or were at all times relevant to the issues involved, employees of respondent, Borden, Inc., at its Columbus Coated Fabrics plant. At the trial court and at the intermediate court level four separate cases were involved. Three were consolidated in the Supreme Court of Ohio, resulting in two case numbers in that court. In view of the agreement of counsel at that time that the Allen case ruling would be dispositive of the Horn case, further reference will be limited herein to the Allen case. In effect, the Petition herein has followed this same procedure.

The Complaints filed in each of these cases, except for the names of the plaintiffs, were identical.

On the basis of allegations that each "suffer from various stages of peripheral neuropathy," resulting from having been "exposed to the fumes and otherwise noxious characteristics of MBK and MEK within the scope of their employment," suits were filed by petitioners against designated manufacturers and distributors of MBK and MEK—chemicals used by Borden in its manufacturing process at Columbus Coated Fabrics—and in the same Complaints suit was also filed against Borden, Edward L. Mahoney, Dewey Bennett and Dr. William Paul. Mahoney was employed by Borden as President of its Columbus Coated Fabrics

(CCF) Division. Bennett was employed as Safety Director. Dr. Paul, represented by other counsel, was named as a defendant as having then been employed by Borden "in his professional capacity."

Recovery of damages was sought from the manufacturers and distributors of MBK and MEK on the basis of allegations of negligence, express warranty, implied warranty and placing "unsafe and unreasonably dangerous" products "upon the market."

Recovery of damages from Borden, Mahoney, Bennett and Paul was sought on the basis of various allegations of "knowledge and notice" of the existence of "serious health hazards," of failing to "correct said conditions," of failing to "warn plaintiffs of the dangers," of failing to "report" such conditions to various state and federal agencies, and, after having reported such conditions to governmental agencies, of failing to "implement and obey" various orders of governmental agencies. The Complaint (¶ 32) alleged that such acts "of omission and commission" constituted "negligence" and (¶ 38) that they "were intentional, malicious, and in willful and wanton disregard of their duty to protect the health of the plaintiffs."

Omitting names and addresses of numerous plaintiffs and numerous defendants, the full text of the Complaint in the Allen case is set forth herein as Appendix B, *infra*, p. 20.

Motions for summary judgment were filed in the Common Pleas Court on behalf of Borden, Mahoney, Bennett and Paul, accompanied by proof that Borden was a complying employer, having been granted authority by the Ohio Industrial Commission to pay compensation directly to its injured employees, and proof by affidavit that 60 of plaintiffs had already filed

claims for workmen's compensation benefits, all of which had been allowed, and listing the monetary compensation theretofor paid to them by Borden.

No counter-affidavits or other documentary evidentiary statements were filed in opposition to the motions for summary judgment, as authorized by Rule 56 of the Ohio Rules of Civil Procedure, and the motions for summary judgment filed in the trial court on February 19, 1975 were ultimately sustained by decision of the trial court of June 23, 1975 (Appendix A-1 herein, p. 15).

The claims for damages against the manufacturers and suppliers of the chemicals in question are still pending in the trial court. Pursuant to the provisions of Rule 54(B) of the Ohio Rules of Civil Procedure, the Common Pleas Court entered final judgment in favor of Borden, Mahoney, Bennett and Paul.

As noted in the Petition, the Court of Appeals of Franklin County, Ohio affirmed the judgment of the trial court in such respect in each of the cases, and thereafter the Supreme Court of Ohio overruled motions to certify the record and *sua sponte* dismissed the appeals.

Since the right of the petitioners, as employees, to sue their own employer and fellow employees for damages for injuries received in the course of and arising out of their employment was determined by the trial court under summary judgment proceedings, wherein the Complaint, the Motion for Summary Judgment and the Affidavits in support thereof constituted the entire record of the case, it is apparent that the statements appearing at p. 4 and at the top half of p. 5 of the Petition are nowhere reflected in any record. This being true, no useful purpose would be served by a detailed

recitation of the facts as we know them. Simply as a matter of public record, however, we would, and do, vehemently dispute the basic implications thereof. While there was an onset of apparent chemical induced nerve disease in September and October, 1973, its possible cause as allegedly resulting from exposure to MBK or MEK was neither known nor suspected prior to that time. The Occupational Safety and Health Administration investigation, referred to in such statement, had no relationship to the problem as it eventually developed.

In any event, we respectfully submit that such statements, being nowhere reflected in the record, are not in conformity to Rule 23 of the Rules of this Court with respect to the contents of a Petition for Certiorari.

STAGE OF PROCEEDINGS AT WHICH FEDERAL QUESTIONS WERE FIRST RAISED

The first claim made by counsel for petitioners raising any federal questions was in the memorandum in support of a motion requesting the trial court to reconsider its decision of June 23, 1975 sustaining Motions for Summary Judgment. It was contended there "that the Ohio Workmen's Compensation Laws, based on Article II, Section 35, of the Ohio Constitution, are unconstitutional under the 14th Amendment of the U.S. Constitution."

ARGUMENT

Essentially, it is the contention of counsel for petitioners that, as a matter of federal "due process" and "equal protection," petitioners have a "constitutional right" to "full compensation," including "damages for pain and suffering, loss of services of the spouse, and

punitive damages," enforceable by civil court action; that Article II, Section 35 of the Ohio Constitution and Sections 4123.74 and 4123.741, Ohio Revised Code, foreclose the petitioners from exercising this "right" and that the Ohio constitutional provisions and the statutes, therefore, are unconstitutional.

It is asserted (Petition, p. 15) that "[t]he total denial of petitioners' rights of access to the Courts of Ohio, the only historically adequate forum wherein petitioners can be fairly compensated, is repugnant to the Fifth and Fourteenth Amendments of the United States Constitution."

None of the cases cited, or referred to, in the Petition are supportive of any such claim. The only case referred to which related in any way to workmen's compensation laws is *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), holding that Louisana's denial of equal recovery rights to dependent, unacknowledged, illegitimate children violates the Equal Protection Clause of the Fourteenth Amendment. The claims of unconstitutionality advanced by petitioners are inferentially, but necessarily rejected in *Weber* wherein the opinion states (pp. 171-172):

> ". . . workmen's compensation codes represent outgrowths and modifications of our basic tort law. . . [They] removed difficult obstacles to recovery in work-related injuries by offering a *more certain*, though generally *less remunerative*, compensation." (Emphasis added)

The other cases, cited in the Petition involve such questions as the right to hearing prior to renewal of a nontenured teacher's contract [*Bd. of Regents* v. *Roth*, 408 U.S. 564 (1972)]; the validity of a one-year residence requirement for registration to vote [*Dunn*

v. *Blumstein*, 405 U.S. 330 (1972)]; the validity of prejudgment replevin laws [*Fuentes* v. *Shevin*, 407 U.S. 67 (1972)]; the validity of criminal statutes prohibiting unmarried, interracial couples from habitually occupying the same room in the nighttime [*McLaughlin* v. *Florida*, 379 U.S. 184 (1964)]; the denial to noncitizens of the United States of the right to take a State Bar examination [*In re Griffiths*, 413 U.S. 717 (1973)]; etc., have no possible relevancy with respect to the claims being advanced by petitioners.

Rule 19 of this Court relating to "Considerations Governing Review on Certiorari" provides:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.
>
> . . ."

Here, any potential federal question of substance has heretofore been determined by this Court in a long series of cases, involving not only the workmen's compensation laws of the various states but also federal workmen's compensation laws, such as the Longshoremen's and Harbor Workers' Compensation Act and the Federal Employees Compensation Act.

The constitutionality of the Ohio Workmen's Compensation Act was upheld in *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U.S. 571 (1915).

In *Northern Pacific Ry. Co.* v. *Meese*, 239 U.S. 614 (1916), this Court rejected the claim that the Washington Workmen's Compensation Act was unconstitutional as a denial of equal protection of the law. It was recognized therein (p. 620) that the remedy provided to an injured workman by the Workmen's Compensation Act of Washington was intended "to be exclusive of every other remedy."

In three related decisions this Court upheld the constitutionality of the Workmen's Compensation Act of the states of New York, Iowa and Washington. *New York Central Railroad Company* v. *White*, 243 U.S. 188 (1916); *Hawkins* v. *Bleakley*, 243 U.S. 210 (1916); and *Mountain Timber Company* v. *State of Washington*, 243 U.S. 219 (1916). Each of these cases necessarily involved the question of the constitutionality of those provisions which limited or precluded the "right" of an injured employee to recover common law "damages". The reasoning adopted therein necessarily rejected the very contentions now being made by the petitioners.

We quote from the opinion in the *New York Central Railroad Company* case:

> "The adverse considerations urged or suggested in this case and in kindred cases submitted at the same time are: * * *
>
> (b) that the employee's rights are interfered with, in that he is prevented from having compensation for injuries arising from the employer's fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act * * *.
>
> In support of the legislation, it is said that the whole common-law doctrine of employer's liability for negligence, with its defenses of contributory

negligence, fellow-servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment; that in the highly organized and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger proportion the expense and delay required for such ascertainment amount in effect to a defeat of justice; that under the present system the injured workman is left to bear the greater part of industrial accident loss, which because of his limited income he is unable to sustain, so that he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity; and that litigation is unduly costly and tedious, encouraging corrupt practices and arousing antagonisms between employers and employees.

In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer * * * *the exemption from further liability is an essential part of the scheme, so that the statute if invalid as against the employee is invalid as against the employer.*

* * * *No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged* for his benefit * * * *The common law bases the employer's liability for injuries to the employee upon the ground of negligence*; but negligence is merely the disregard of some duty imposed by law; and the *nature and extent of the duty may be modified by legislation*, with corresponding change in the test of negligence."

(Emphasis added)

The rationale of these three cases has been uniformly followed by this Court, by all Federal Courts and by all State Courts since that time.

In *Middleton v. Texas Power & Light Company*, 249 U.S. 152 (1918), this Court specifically rejected the assertion that workmen's compensation laws constitute a "deprivation of liberty and property without due process of law" by requiring employees to accept it and thus eliminating an employees' common law remedy. We quote from the opinion at page 163 thereof:

> "The definition of negligence, contributory negligence, and assumption of risk, the effect to be given to them, the rule of respondeat superior, the *imposition of liability without fault*, and the *exemption from liability in spite of fault*—all these, as *rules of conduct*, are *subject to legislative modification*. And a plan imposing upon the employer responsibility for making compensation for disabling or fatal injuries irrespective of the question of fault, and *requiring the employee to assume all risk of damages over and above the statutory schedule*, when established as a reasonable substitute for the legal measure of duty and responsibility previously existing, *may be made compulsory upon employees as well as employers.*" (Emphasis added)

Other cases decided by this Court upholding the constitutionality of state workmen's compensation laws, including the "exclusive remedy" provisions thereof, include *Arizona Employers' Liability Cases*, 250 U.S. 400 (1919), *New York Central Railroad Co.* v. *Bianc*, 250 U.S. 596 (1919) and *Dahlstrom Metallic Door Co. v. Ind. Bd. of N.Y.*, 284 U.S. 594 (1931).

In *Crowell* v. *Benson*, 285 U.S. 22 (1932), this Court upheld the constitutionality of the Longshoremen's and

Harbor Workers' Compensation Act (33 U.S.C. §901, et seq.), rejecting claims that it violated the Due Process Clauses of either the Fifth or Fourteenth Amendments.

This Act by §905 provides that the "liability of an employer" thereunder "shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, or anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death," excepting only cases where the "employer fails to secure payment of compensation" as required by the Act.

This Act, by §933(i) also provides that the "right to compensation or benefits . . . shall be the *exclusive remedy* to an employee when he is injured. . . *by the negligence or wrong of any other person in the same employ.*" (Emphasis added)

United States v. *Demko*, 385 U.S. 149 (1966), held that the compensation system provided by federal statute covering federal prisoners injured in prison employment was the "exclusive remedy" for such injury. That workmen's compensation statutes "are practically always thought of as substitutes for, not supplements to, common-law tort actions" is recognized in the opinion of Mr. Justice Black at p. 151 of *Demko*.

Congress, by the adoption of the Occupational Safety and Health Act specifically provided that nothing in that Act "shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to any injury, diseases, or death of employees arising out of, or in the course of, employment," 29 U.S.C.

§653(b)(4).

The Ohio workmen's compensation laws do not preclude actions by an injured employee against a third party tortfeasor. *Trumbull Cliffs Furnace Co.* v. *Schachovsky*, 111 Ohio St. 791 (1924); *Ohio Public Service Co.* v. *Sharkey*, 117 Ohio St. 586 (1927); *Truscon Steel Co.* v. *Trumbull Cliffs Furnace Co.*, 120 Ohio St. 394 (1929). An employer has no right of participation or subrogation in any recovery by his employee against a third party. Under the Ohio "collateral source rule" evidence of payment of compensation or medical expenses under workmen's compensation laws is not even admissible in the employee's suit against the third party tortfeasor. *McDowell* v. *Rockey*, 32 Ohio App. 26 (1929); *Levy* v. *Coon*, 11 Ohio App. 2d 200 (1964); *Pryor* v. *Webber*, 23 Ohio St. 2d 104 (1970). It is upon this basis that these cases are still pending in the trial court with respect to petitioners' claims for damages against the manufacturers and distributors of MBK and MEK.

The claims made by the petitioners herein constitute a frontal attack on the constitutionality of all of the workmen's compensation acts of the states and of the federal government. It is predicated on the bald assertion that the courts are the *only* "adequate forum" where petitioners could be "fairly compensated," and that the denial of petitioners' "rights of access" to the courts "is repugnant" to the Fifth and Fourteenth Amendments. This concept, if accepted, would require the overruling of all of this Court's opinions relating to the validity of workmen's compensation acts over the past sixty years, and would require the invalidation of every workmen's compensation act now in force and effect in the various states and in the federal government.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

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APPENDIX A-1

COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

Case No. 74CV-09-3265

CHARLES E. ALLEN, et al.,
Plaintiffs,

vs.

EASTMAN KODAK COMPANY, et al.,
Defendants.

DECISION

Rendered this 23rd day of June, 1975.

MARTIN, J.

The motion of Plaintiffs filed April 17, 1975, for an extension of time is OVERRULED.

The motion of Plaintiffs filed March 28, 1975, for permission to file an amended complaint setting forth additional Defendants is SUSTAINED.

The motion of Defendant William T. Paul, M.D., for Summary Judgment filed February 26, 1975 is SUSTAINED on the grounds set forth in the first paragraph of the motion.

The motion of Borden, Inc., for Summary Judgment filed February 19, 1975, is SUSTAINED on the grounds set forth in the first paragraph of the motion. Upon the same grounds and for the further reason that a "named Defendant" Columbus Coated Fabrics Division of Borden Chemical Co. is shown to be a "Division" of Defendant Borden, Inc., the granting of the Motion for Summary Judgment should include the "named Defendant".

The motion of Defendants Edward L. Mahoney and Dewey Bennett for Summary Judgment filed February 19, 1975, is SUSTAINED on the grounds set forth in the first paragraph of the motion.

An Entry shall be prepared reflecting this Decision.

/s/ PAUL W. MARTIN, *Judge*

APPENDIX A-2

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

No. 74CV-09-3265

CHARLES E. ALLEN, et al.,
Plaintiffs,

vs.

EASTMAN KODAK COMPANY, et al.,
Defendants.

JUDGMENT ENTRY

Pursuant to the provisions of Civil Rule 56, the following matters have come on for hearing before the Court:

1) The Motion of defendant, Borden, Inc., filed February 19, 1975 for Summary Judgment in its favor and dismissing it as a party-defendant;

2) The Joint Motion of defendants, Edward L. Mahoney and Dewey Bennett, filed February 19, 1975 for Summary Judgment in their favor and dismissing them as parties-defendant;

3) The Motion of defendant, William T. Paul, M.D., filed February 26, 1975 for Summary Judgment in his favor and dismissing him as a party-defendant.

The Motion of plaintiffs filed April 17, 1975 for a further extension of time to respond to such Motions for Summary Judgment is overruled.

Upon consideration of the merits of the foregoing Motions for Summary Judgment, the Court finds from the pleadings and affidavits attached to such Motions, that there is no genuine issue as to any material fact with respect to compliance by Borden, Inc. with the

provisions and requirements of the Ohio Workmen's Compensation Act (R.C. 4123.01 to 4123.97, inclusive); as to the fact that the personal injuries with respect to which plaintiffs seek to recover damages were received in the course of and arising out of their employment with Borden, Inc. at its Columbus, Ohio manufacturing facility [designated "Columbus Coated Fabrics"], and thus are compensable under the provisions of the Ohio Workmen's Compensation Act; and as to the fact that defendants, Edward L. Mahoney, Dewey Bennett and William T. Paul, M.D., at all times involved herein, were also employees of Borden, Inc.

The Court finds, therefore, as a matter of law that pursuant to the provisions of R.C. 4123.74 and of Section 35, Article II of the Constitution of Ohio, Borden, Inc. [and "Columbus Coated Fabrics"], as the employer of each of the plaintiffs herein, cannot be held liable to respond in damages for the injuries alleged herein; that this Court is not empowered by law to provide redress by an employer for a work-related injury or disease of a person employed by an employer who has complied with the Ohio Workmen's Compensation Act; and thus this Court lacks jurisdiction to entertain this action against defendant Borden, Inc. [or against "Columbus Coated Fabrics"].

The Court further finds, as a matter of law, that pursuant to the provisions of R.C. 4123.741 defendants, Edward L. Mahoney, Dewey Bennett and William T. Paul, M.D., as employees of plaintiffs' employer, cannot be held to be liable to respond in damages for such injuries to plaintiffs.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Motions of defendants, Borden, Inc., Edward L. Mahoney, Dewey Bennett and

William T. Paul, M.D., for Summary Judgment in their favor are sustained; and summary judgment is hereby entered dismissing Borden, Inc. [and "Columbus Coated Fabrics"], Edward L. Mahoney, Dewey Bennett and William T. Paul, M.D. as parties-defendants with respect to the claims made against them by the plaintiffs, with prejudice to future action against them by plaintiffs.

The summary judgment entered herein constitutes a final judgment, the Court, pursuant to Civil Rule 54(B), expressly finding and determining that said summary judgment involves questions of law applicable only to the issues joined between plaintiffs and these defendants; that the determination thereof will have no effect upon the issues joined herein with respect to other parties; and that there is no just reason for delay in granting final judgment at this time in favor of defendants, Borden, Inc. [including "Columbus Coated Fabrics"], Edward L. Mahoney, Dewey Bennett and William T. Paul, M.D.

/s/ PAUL W. MARTIN, *Judge*

APPENDIX B

**IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO**

Case No. 74CV-09-3265

CHARLES E. ALLEN, et al.
Plaintiffs

vs.

EASTMAN KODAK COMPANY, et al.
Defendants.

SECOND AMENDED COMPLAINT

First Cause of Action

1. At all times relevant, Defendants enumerated above engaged in the following activities and had the following places of business: Defendant Eastman Kodak Company is a New Jersey corporation with its principal place of business in New York and licensed to do business in Ohio. Defendant Eastman Chemical Products, Inc. is a New York corporation with its principal place of business in Tennessee and licensed to do business in Ohio. Defendants Eastman Kodak Company and Eastman Chemical Products, Inc. manufactured and placed on the market certain chemicals including, but not limited to, chemicals demoninated MBK and MEK. Defendants Arco Chemical, Shell Chemical Company, Celanese Chemical Company, Exxon Chemical Company, Union Carbide, and Texaco, Inc. manufactured and placed on the market certain chemicals including, but not limited to, chemicals denominated MEK: Defendant Ashland Chemical Company packaged and distributed certain chemicals including, but not limited to, chemicals denominated MBK and MEK for all of the above-enumerated Defendants to Columbus Coated Fabrics, a Division of Borden Chemical Co., which is a Division of Borden, Inc., engaged in the business of manufacturing and selling vinyl products. Defendant Edward L. Mahoney, at all times relevant, was President of Columbus Coated Fabrics. Defendant Dewey Bennett, at all times relevant, was Safety Director of Columbus Coated Fabrics. Defendant William T. Paul, M.D. was, at all times relevant, employed by Borden, Inc. and Columbus Coated Fabrics in his professional capacity.

2. Plaintiffs, at all times material, were employees of the Defendants, Borden, Inc. and Columbus Coated Fabrics. Each of the said Plaintiffs suffer from various stages of peripheral neuropathy.

3. Prior to March 1973, the named Defendant manufacturers and distributors manufactured and/or distributed on the market place certain chemicals including, but not limited to, chemicals denominated MBK and MEK.

4. Prior to March 1973, the above-named Defendant manufacturers and distributors contracted with Defendants Borden, Inc. and Columbus Coated Fabrics for the purchase of MBK and MEK to be used in the manufacturing process at the Columbus Coated Fabrics facility in Columbus, Ohio.

5. Prior and subsequent to March 1973, Plaintiffs were exposed to the fumes and otherwise noxious characteristics of MBK and MEK within the scope of their employment. As a direct result of the negligence of the Defendants Eastman Kodak Company and Eastman Chemical Products, Inc. in manufacturing

and distributing MBK; and Ashland Chemical Company in distributing MBK; Defendants Arco Chemical, Shell Chemical Comany, Celanese Chemical Company, Exxon Chemical Company, Union Carbide, and Texaco, Inc. in the manufacture of MEK; and Arco Chemical, Shell Chemical Company, Celanese Chemical Company, Exxon Chemical Company, Union Carbide, Texaco, Inc., Ashland Chemical Co., and Tag Chemical in the distribution of MEK and in failing to adequately warn the users of the dangerous nature of said chemicals, on or about March 1973 and at various times thereafter, Plaintiffs have been injured as hereinafter set forth.

Second Cause of Action

6. Plaintiffs reallege paragraphs 1 through 4 of the First Cause of Action as if fully rewritten herein.

7. Defendants Eastman Kodak Company and Eastman Chemical Products, Inc. in manufacturing, packaging, and selling MBK; Defendants Arco Chemical, Shell Chemical Company, Celanese Chemical Company, Exxon Chemical Company, Union Carbide, Texaco, Inc. in manufacturing and selling MEK; Defendant Ashland Chemical in packaging and distributing both MBK and MEK; and Defendant Tag Chemical in packaging and distributing MEK to Borden, Inc. and to Columbus Coated Fabrics (hereinafter CCF), all knew or should have known that said chemicals were to be used in the manufacturing process at CCF and expressly warranted that said chemicals were suitable and reasonably fit or reasonably safe for the purpose for which they were intended to be used.

8. Plaintiffs relied on the skill and judgment of the above-named Defendants and upon said Defendants'

warranties in working with and in the presence of such chemicals.

9. These said express warranties were not true and the said chemicals were not suitable and reasonably fit or reasonably safe to be used for the purpose for which they were intended to be used.

10. As a direct result of the breach of express warranties by said Defendants, Plaintiffs were injured as hereinafter set forth.

Third Cause of Action

11. Plaintiffs reallege paragraphs 1 through 4 of the First Cause of Action as if fully rewritten herein.

12. Defendants Eastman Kodak Company and Eastman Chemical Products, Inc., in the manufacturing, packaging and selling of MBK; Defendants Arco Chemical, Shell Chemical Company, Celanese Chemical Company, Exxon Chemical Company, Union Carbide, and Texaco, Inc. in the manufacture, packaging, and selling of MEK; Defendant Ashland Chemical Co. in the packaging and distributing of MEK and MBK; and Defendant Tag Chemical in the packaging and distributing of MEK to Borden, Inc. and CCF, all knew or should have known that said chemicals were to be used in a manufacturing process at CCF and impliedly warranted to Plaintiffs that said chemicals were of a good and merchantable quality and were reasonably safe and fit for the purpose for which they were intended to be used.

13. Plaintiffs relied upon the skill and judgment of the Defendants and upon said Defendants' Implied warranties in working with and in the presence of said chemicals.

14. At the time of the sale of said chemicals to

Plaintiffs' employers, Borden, Inc. and CCF, the implied warranties were not true and the said chemicals were not of a merchantable quality and were not suitable and reasonably fit or reasonably safe to be used for the purpose for which they were intended to be used.

15. As a direct result of the breach of the implied warranties, Plaintiffs were injured as hereinafter set forth.

Fourth Cause of Action

16. Plaintiffs reallege paragraphs 1 through 4 of the First Cause of Action as if fully rewritten herein.

17. Defendants Eastman Kodak and Eastman Chemical, in manufacturing, packaging, and selling MBK; Defendants Arco, Shell, Celanese, Exxon, Union Carbide and Texaco, in manufacturing, packaging, and selling MEK; Defendant Ashland, in packaging and distributing MBK and MEK; and Defendant Tag, in packaging and distributing MEK to Borden, Inc. and Columbus Coated Fabrics, all placed upon the market, chemicals which were unsafe and unreasonably dangerous for their intended use.

18. The above enumerated Defendants, in manufacturing, selling, packaging, and distributing said chemicals, knew that the chemicals would be used without inspection and represented that the said chemicals would safely perform the function they were intended to do.

19. Plaintiffs used and were in contact with said chemicals in a manner which was reasonably foreseeable by the said Defendants.

20. Plaintiffs, while the said chemicals were being used for the purposes and in the manner which they

were intended to be used by said manufacturing, selling, packaging and distributing Defendants, were injured as a direct result of the defective and unreasonably dangerous nature of the said chemicals.

21. As a result of the manufacturing, packaging, selling, and distributing by Defendants and Defendant's aforementioned negligence and failure to warn, as a result of the breach of their express and implied warranties, and as a result of the defective nature of the aforementioned chemicals, the Plaintiffs, on or about March, 1973, and at various times thereafter, have been rendered sick and poisoned, causing them pain, discomfort and emotional distress which will continue for the indefinite future, and causing permanent injury.

22. Plaintiffs have incurred medical and hospital expenses, and they expect to incur further such expenses in the future.

23. Plaintiffs have been unable to obtain life insurance and have been forced to absent themselves from work, resulting in loss of earnings, and they expect to lose further such earnings in the future.

Fifth Cause of Action

24. Plaintiffs reallege paragraphs 1 and 2 of the First Cause of Action as if fully rewritten here.

25. Defendants Borden, Inc. and CCF, through their duly authorized agents and employees and through the Defendants Edward L. Mahoney and Dewey Bennett, and Defendants Edward L. Mahoney and Dewey Bennett had knowledge and notice that dangerous health conditions and serious health hazards existed in the manufacturing facility of CCF and in CCF's warehouse in Worthington, Ohio, prior to August, 1973.

26. Defendants Borden, Inc., CCF, Edward L. Mahoney and Dewey Bennett had a duty to correct such conditions and to warn Plaintiffs of these conditions and health hazards and a duty to report said conditions and hazards to various State and Federal agencies by law, all to protect the health and welfare of the Plaintiffs.

27. Notwithstanding the knowledge of said Defendants that such conditions and hazards existed, the Defendants, Borden, Inc., CCF, Edward L. Mahoney and Dewey Bennett failed to correct said conditions, failed to warn Plaintiffs of the dangers and conditions that existed and failed to report said conditions to the various State and Federal agencies to which they were required to report by law, such acts being of omission and commission and constituting negligence.

28. Such failure on the part of the said Defendants was intentional, malicious and in willful and wanton disregard of the health of the Plaintiffs. As a direct and proximate result of this malicious and willful failure to correct, warn and report the health hazards and dangerous conditions that existed, the Plaintiffs have been injured as hereinafter set forth.

Sixth Cause of Action

29. Plaintiffs reallege paragraphs 1 and 2 of the First Cause of Action and paragraphs 25 through 28 of the Fifth Cause of Action as if fully rewritten herein.

30. On or about August, 1973, and subsequent to that time, the Defendants Borden, Inc. and CCF, by and through their duly authorized agents and employees and through Edward L. Mahoney and Dewey Bennett, disclosed to various State and Federal

agencies to whom they were required to report that various conditions and health hazards existed at the CCF manufacturing facility and at the CCF Worthington warehouse.

31. Prior to and subsequent to said disclosures and as a result of the various State and Federal agencies' investigations and inspections of the CCF facilities, orders were issued by these agencies to Defendants Borden, Inc., CCF, Edward L. Mahoney and Dewey Bennett to correct the dangerous health conditions and hazards that existed at the CCF facilities in order to protect the health and safety of the Plaintiffs and which orders the said Defendants were obligated by law to obey.

32. Defendants Borden, Inc., CCF, Edward L. Mahoney and Dewey Bennett did not implement or obey these orders, in direct violation of State and Federal law and in violation of their duty to protect the health and safety of the Plaintiffs, such acts being of omission and commission and constituting negligence.

33. Said omissions and commissions by the Defendants were intentional, malicious and in willful and wanton disregard of the health of the Plaintiffs. As a direct and proximate result of said Defendants' willful negligence, the Plaintiffs have been injured as hereinafter set forth.

Seventh Cause of Action

34. Plaintiffs reallege paragraphs 1 and 2 of the First Cause of Action as if fully rewritten herein.

35. Prior to August, 1973, Defendants Borden, Inc. and CCF, through their duly authorized agents and employees, and Defendant William T. Paul, M.D.,

had knowledge and notice that certain occupational diseases were being contracted at the CCF manufacturing and warehouse facilities.

36. Defendants had a duty to warn the Plaintiffs concerning such disease and to report such occupational diseases to, while not limited to, State officials pursuant to Ohio Revised Code 3701.25, all to protect the health and safety of the Plaintiffs.

37. Notwithstanding the knowledge of said Defendants that certain occupational diseases were being contracted, the Defendants, Borden, Inc., CCF and William T. Paul, M.D., failed to warn the Plaintiffs and failed to report the diseases as required by law, such acts being of omission and commission and constituting negligence.

38. Said omissions and commissions by the Defendants were intentional, malicious, and in willful and wanton disregard of their duty to protect the health of the Plaintiffs.

39. As a direct and proximate result of the Defendants' Borden, Inc., CCF, Edward L. Mahoney, Dewey Bennett, and William T. Paul, M.D. intentional, malicious and willful and wanton failure to correct, warn and report the health hazards, dangerous conditions and occupational diseases that existed at CCF, and their intentional, malicious, and willful and wanton failure to implement and obey the various orders given them by State and Federal agencies to protect the health and safety of the Plaintiffs, the Plaintiffs, on or about March, 1973, and at various times thereafter have been rendered sick and poisoned, causing them pain, discomfort and emotional distress which will continue for the indefinite future and causing permanent injury.

40. Plaintiffs have incurred medical and hospital expenses and expect to incur further expenses in the future.

41. Plaintiffs have been unable to obtain life insurance and have been forced to absent themselves from work, resulting in loss of earnings, and they expect to lose further such earnings in the future.

WHEREFORE, Plaintiffs each individually demand judgment against the Defendants, jointly and severally, in the amount of Five Hundred Thousand Dollars ($500,000.00) as compensatory and punitive damages, together with attorneys fees and costs.

/s/ PHILIP R. BRADLEY
Attorney for Plaintiffs